Public Prosecutor v Tengku Adnan bin Tengku Mansor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-18–02 OF 2020(W)
NALLINI PATHMANATHAN, VERNON ONG AND ABDUL RAHMAN SEBLI FCJJ
17 JULY 2020

Civil Procedure — Judge — Application to recuse judge — Whether there was real danger judge who had convicted and sentenced accused who had pleaded guilty in joint trial would be biased against co-accused who claimed trial — Whether no competent judge would allow himself to be prejudiced simply because he had seen/heard facts of case and documentary evidence relating to case of accused who pleaded guilty — Whether prosecution had to prove its case beyond reasonable doubt against co-accused with the evidence being subjected to cross-examination — Whether Court of Appeal wrong to give impression that trial judges should not continue to hear a joint trial if they had accepted guilty plea of one of the accused

The respondent was charged with an offence of accepting a RM1m bribe from another person ('Tan') who was charged separately for giving that bribe to the respondent. The prosecution successfully applied for the cases against the respondent and Tan to be jointly tried. Prior to commencement of the joint trial, Tan plea-bargained with the prosecution and pleaded guilty to an alternative charge of abetting the respondent in the commission of the corruption offence and was convicted and sentenced. The prosecution indicated that Tan might testify in their favour in the case against the respondent. On the day of the trial, the respondent sought to recuse the trial judge on the ground that since he had heard and recorded the facts of the case against Tan and had expressed his views on corruption before sentencing him, there was a real danger the trial judge might be biased against him (the respondent). The High Court dismissed the recusal application holding that: (a) Tan's guilty plea and admission of facts was not evidence that was automatically admissible against the respondent; the prosecution's evidence against the respondent would have to be formally adduced and be subjected to cross-examination; (b) the respondent and Tan were not charged with committing an offence in furtherance of a common intention under s 34 of the Penal Code; hence, there was no question of joint liability between them; and (c) judges by virtue of their training and guided by case-law knew what they were supposed to do if a co-accused in a joint trial pleaded guilty, and it was not to recuse themselves on the flimsiest of grounds. The Court of Appeal ('COA') reversed the High Court's decision holding that since the 'real danger of bias' test was concerned with the possibility, and not the probability, of bias, then in the circumstances of the case, there was a real possibility the trial judge might

be prejudiced against the respondent after having heard and seen the facts of the case and documentary exhibits produced by the prosecution in Tan's case. The COA held that the trial judge erred in relying upon *Yap See Teck v Public Prosecutor* [1983] 1 MLJ 410 and *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 in coming to his decision because those cases did not consider the 'real danger of bias' test which was first adopted in Malaysia by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1.

Held, unanimously allowing the appeal and setting aside the COA's decision:

(1) The COA committed errors of law and applied the law incorrectly to the facts of this case (see para 31).

(2) The COA effectively held that without the 'real danger of bias' test, which was introduced into this jurisdiction in Sungai Gelugor, the courts in Malaysia had for decades prior to that case, not dealt with the issue of bias or impartiality correctly or at all. The further implication was that *Yap See Teck* was incorrectly determined and *Mohd Amin* Mohd Razali was decided per incuriam without considering Sungai Gelugor. These propositions were erroneous. The effect of the decisions in *Yap See Teck* and *Mohd Amin bin Mohd Razali* was that when an accused in a joint trial pleaded guilty and was convicted and sentenced, his co-accused would still receive a fair trial because all the facts pertaining to the charge would have to be adduced and proven afresh against the co-accused who would have full opportunity to defend himself via the subsisting criminal justice system which placed primary importance on the impartiality of a trial judge. If the co-accused who had not pleaded guilty faced a real possibility of bias, such a procedure would not have been approved and set down in respect of joint trials, a practice that had been followed for decades in the criminal courts to this day (see paras 20, 22 & 30).

(3) The COA failed to consider that Tan's guilty plea was not evidence against the respondent. The judge was required to consider separately and independently the evidence against the respondent. It was incorrect to assume that a mere recording or sighting of a factual matrix involving the accused who had pleaded guilty would create bias in the presiding judge (see paras 22 & 30).

(4) The COA failed to appreciate that when an accused pleaded guilty there was no trial or adjudication of issues or finding of facts that could be used against his co-accused. Nor was there any issue of the accused who had pleaded guilty being considered or accepted as a credible witness against the co-accused (see para 22).

(5) The COA failed to consider that even if the respondent's case was heard by a new judge, the record of Tan's plea of guilt and the facts of the case in connection therewith would be equally available to the new judge. Hence, any allegation of a real danger of bias in relation to the original court and the original presiding judge was unfounded (see para 30).

(6) As cautioned by the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, each case had to be decided on its own facts and the Court had to be vigilant not to allow parties to do 'judge-shopping' by way of recusal of judges (see paras 24–25).

(7) The 'real danger of bias' test did not prescribe a very low threshold of bias but only applied a lower threshold than an 'apprehension of bias' or a 'likelihood of bias'. Such a threshold did not automatically mean an extremely low threshold. The COA erred in applying a very low threshold of bias by applying a test for 'a possibility (danger) of real bias' when the correct test was 'a real possibility (danger) of bias' (see paras 27–29).

(8) The practice of a presiding judge continuing to hear a joint trial after one of the accused had pleaded guilty was settled law in this jurisdiction based on a long line of authorities prescribing the procedure for maintaining impartiality in such joint trials. The reasoning in those authorities should not be lightly disturbed on relatively flimsy grounds. The fact that the 'real danger of bias' test was only adopted in this country after Sungai Gelugor should not erode the jurisprudence that had accommodated and ensured impartiality in the older criminal case-law. It could not be said that those cases never addressed the test of a real possibility of bias (see para 30).

[Bahasa Malaysia summary

Responden telah dituduh dengan kesalahan menerima suapan RM1 juta daripada seorang ('Tan') yang dituduh secara berasingan kerana memberi rasuah kepada responden. Pihak pendakwaan telah berjaya dalam permohonan agar kes-kes terhadap responden dan Tan dibicarakan secara bersesama. Sebelum perbicaraan bersama bermula, Tan mengaku tawawan dengan pihak pendakwaan untuk pengakuan bersalah atas tuduhan alternatif bersubahat dengan responden dalam melakukan kesalahan rasuah dan telah disabitkan dan dijatuhkan hukuman. Pihak pendakwaan menyatakan bahawa Tan mungkin memberi keterangan yang memihak kepada mereka dalam kes tersebut terhadap responden. Semasa hari perbicaraan, responden memohon untuk mengecualikan hakim perbicaraan dengan alasan bahawa oleh kerana beliau telah mendengar dan merekodkan fakta kes terhadap Tan dan telah menyatakan pandangan beliau mengenai rasuah sebelum menjatuhkan hukuman terhadapnya, terdapat bahaya nyata bahawa hakim perbicaraan mungkin bersikap berat sebelah terhadapnya (responden). Mahkamah Tinggi menolak permohonan pengecualian tersebut dengan menyatakan bahawa:

(a) pengakuan bersalah Tan dan pengakuan fakta bukanlah keterangan yang boleh diterima secara automatik terhadap responden; keterangan pihak pendakwaan terhadap responden haruslah dikemukakan secara formal dan bergantung kepada pemeriksaan balas; (b) responden dan Tan tidak dituduh melakukan kesalahan dengan niat bersama di bawah s 34 Kanun Keseksaan; oleh itu, tidak ada persoalan mengenai liabiliti bersama antara mereka; and (c) hakim berdasarkan tugasan mereka dan berdasarkan undang-undang tahu apa yang harus mereka lakukan sekiranya tertuduh bersama dalam perbicaraan membuat pengakuan salah, dan tidak akan mengecualikan diri mereka hanya dengan alasan remeh. Mahkamah Rayuan ('MR') menukar keputusan Mahkamah Tinggi dengan menyatakan bahawa kerana ujian 'real danger of bias' berkaitan dengan kemungkinan, dan bukan kebarangkalian, berat sebelah, maka dalam keadaan kes, terdapat kemungkinan sebenar hakim perbicaraan mungkin berprasangka buruk terhadap responden setelah mendengar dan melihat fakta kes dan dokumentari eksibit yang dikemukakan oleh pihak pendakwaan dalam kes Tan. MR memutuskan bahawa hakim perbicaraan telah terkhilaf dalam bergantung pada *Yap See Teck v Public Prosecutor* [1983] 1 MLJ 410 dan *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 dalam membuat keputusan kerana kes-kes tersebut tidak menimbangkan ujian 'real danger of bias' yang kali pertama digunapakai di Malaysia oleh Mahkamah Persekutuan dalam *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan MR:

(1) MR membuat kekhilafan undang-undang dan menggunapakai undang-undang yang tidak tepat pada fakta kes ini (lihat perenggan 31).

(2) MR secara efektif memutuskan bahawa tanpa ujian 'real danger of bias', yang diperkenalkan dalam bidang kuasa ini di Sungai Gelugor, Mahkamah di Malaysia yang selama beberapa dekad sebelum kes tersebut, tidak dapat menangani isu bias atau berat sebelah dengan betul atau sama sekali. Implikasi lebih lanjut adalah bahawa *Yap See Teck* diputuskan dengan salah dan *Mohd Amin bin Mohd Razali* diputuskan per incuriam tanpa mempertimbangkan Sungai Gelugor. Proposisi ini adalah khilaf. Kesan daripada keputusan *Yap See Teck* dan *Mohd Amin bin Mohd Razali* adalah bahawa ketika tertuduh dalam perbicaraan bersama mengaku bersalah dan disabitkan dan dijatuhkan hukuman, tertuduh bersama akan tetap menerima perbicaraan yang adil kerana semua fakta yang berkaitan dengan pertuduhan harus dikemukakan dan dibuktikan semula terhadap tertuduh bersama yang akan memiliki peluang penuh untuk membela diri melalui sistem perundangan jenayah yang meletakkan kepentingan utama pada ketidakadilan seseorang hakim perbicaraan. Sekiranya tertuduh bersama tidak mengaku bersalah

menghadapi kemungkinan berat sebelah, prosedur seperti itu tidak akan diluluskan dan ditetapkan berkenaan dengan perbicaraan bersama, suatu amalan yang telah dilakukan selama beberapa dekad di mahkamah jenayah sehingga hari ini (lihat perenggan 20, 22 & 30).

(3) MR gagal mengambilkira bahawa pengakuan bersalah Tan bukan bukti terhadap responden. Hakim dikehendaki mempertimbangkan bukti secara berasingan dan bebas terhadap responden. Ianya adalah salah untuk menganggap bahawa hanya rakaman atau melihat kaitan fakta yang melibatkan tertuduh yang telah mengaku bersalah akan menimbulkan berat sebelah kepada hakim (lihat perenggan 22 & 30).

(4) MR gagal mengambilkira bahawa ketika seorang tertuduh mengaku bersalah, tidak ada perbicaraan atau penghakiman atas isu atau dapatan fakta yang dapat digunakan terhadap tertuduh bersama. Juga tidak ada isu mengenai tertuduh yang mengaku bersalah dipanggil atau diterima sebagai saksi yang boleh dipercayai terhadap tertuduh bersama (lihat perenggan 22).

(5) MR gagal mempertimbangkan bahawa walaupun kes responden didengar oleh hakim baru, rekod pengakuan bersalah Tan dan fakta-fakta kes yang berkaitan dengannya akan tersedia sama untuk hakim baru. Oleh itu, sebarang tuduhan mengenai bahaya berat sebelah yang nyata berkaitan dengan mahkamah asal dan hakim yang asal tidak berasas (lihat perenggan 30).

(6) Seperti yang diputuskan oleh Mahkamah Persekutuan dalam *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, setiap kes harus diputuskan berdasarkan fakta sendiri dan mahkamah harus waspada untuk tidak membenarkan pihak melakukan 'judge-shopping' dengan cara menolak hakim (lihat perenggan 24–25).

(7) Ujian 'real danger of bias' tidak menetapkan lantai berat sebelah yang sangat rendah tetapi hanya menerapkan lantai yang lebih rendah daripada 'ketakutan berat sebelah' atau 'kemungkinan bias'. Lantai seperti itu tidak secara automatik bermaksud lantai yang sangat rendah. MR keliru dalam menerapkan lantai berat sebelah yang sangat rendah dengan menerapkan ujian untuk 'a possibility (danger) of real bias' ketika ujian yang betul adalah 'a real possibility (danger) of bias' (lihat perenggan 28–29).

(8) Amalan hakim yang bersidang yang terus mendengar perbicaraan bersama setelah salah seorang tertuduh mengaku bersalah adalah undang-undang yang mantap dalam bidang kuasa ini berdasarkan nas-nas yang luas yang menetapkan prosedur untuk menjaga berat sebelah dalam perbicaraan bersama seperti itu. Alasan dalam nas-nas tersebut tidak boleh sesekali diganggu dengan alasan yang remeh. Fakta bahawa ujian 'real danger of bias' hanya digunapkai di negara ini setelah

A Sungai Gelugor tidak boleh mengikis perundangan yang telah dicapai dan memastikan berat sebelah dalam undang-undang jenayah terdahulu. Tidak dapat dikatakan bahawa kes-kes tersebut tidak pernah menangani ujian kemungkinan bias yang nyata (lihat perenggan 30).]

B **Cases referred to**

B Surinder Singh Kanda v Government of Malaya [1962] AC 322, HL (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257, FC (refd)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)
C *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321,
D FC (refd)
Public Prosecutor v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406, HC (refd)
Porter and another v Magill [2002] 1 All ER 465, HL (refd)
Regina v Gough [1993] AC 646, CA (refd)
E *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; [1950] 1 LNS 81 (refd)
Toh Ah Loh and Mak Thim v Rex [1949] 1 MLJ 54; [1948] 1 LNS 72 (refd)
Yap See Teck v Public Prosecutor [1983] 1 MLJ 410; [1983] 1 CLJ 97 (refd)

Legislation referred to

F Criminal Procedure Code s 172C
Federal Constitution art 5
Malaysian Anti-Corruption Commission Act 2009 s 16(a)(A), (b)(A),
Penal Code ss 34, 109, 165
Rules of the Hight Court 1980 O 18 r 19
G

Appeal from: Criminal Appeal No W-05–407–09 of 2019 (Court of Appeal, Putrajaya)

Manoj Kumar (Julia bt Ibrahim and Lailawati Ali with him) (Attorney General's
H *Chambers) for the appellant.*
Tan Hock Chuan (Satharamban, Michelle Lai, Natalie Tan and Aaron Lau with him) (Tan Hock Chuan & Co) for the respondent.

Nallini Pathmanathan FCJ:

I

[1] This is an appeal by the prosecution against the decision of the Court of Appeal reversing the High Court trial judge's decision dismissing the respondent, Tengku Adnan's application to recuse him from adjudicating in the criminal trial.

FACTUAL BACKGROUND

[2] The factual background is that the respondent was charged under s 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') for *accepting* a bribe of RM1m from Tan Eng Boon ('Tan'). An alternative charge under s 165 was also preferred against him. Tan was charged under s 16(b)(A) of the Act for *giving* the bribe, as well as an alternative charge under s 109 of the Penal Code.

[3] The prosecution applied for a joint trial of the cases against the respondent and Tan. This was granted.

[4] Prior to trial, Tan applied to plea bargain pursuant to s 172C of the Criminal Procedure Code ('the CPC'). Tan pleaded guilty to the alternative charge and was convicted. The prosecution indicated that they would utilise Tan's testimony in their case against the respondent.

[5] Therefore in accordance with well-settled principles and case-law (see *Yap See Teck v Public Prosecutor* [1983] 1 MLJ 410; [1983] 1 CLJ 97) where a co-accused who pleads guilty is required by the prosecution as his witness, the case and the sentencing process is disposed of immediately. This is to avoid the danger that if sentencing is postponed then the co-accused may weight his evidence towards the prosecution in the hope of getting a lighter sentence. Accordingly, the case against Tan was recorded and he was convicted and sentenced to a fine of RM1.5m, and in default imprisonment of one year.

[6] On the day of trial the respondent sought to recuse the trial judge. The primary grounds relied on were that the trial judge had heard and recorded the facts of the case involving Tan and that Tan had agreed to become a prosecution witness. Secondly the respondent took exception to the following statement made by the trial judge in the course of sentencing Tan:

> ... It cannot however be emphasised enough that corruption is a very serious crime. It under mines the social and economic development of the country and adversely affects the fabric of society.

THE DECISION OF THE HIGH COURT

[7] The High Court dismissed the respondent's application for recusal. In summary His Lordship held that:

(a) the fact that Tan had pleaded guilty and that Tan had admitted to the facts put to him by the prosecution did not amount to evidence that was automatically admissible against the respondent. Such evidence would

have to be adduced formally and would be subject to cross-examination by counsel. There was no question of the respondent having admitted to those facts;

(b) judges are not lay jury being professionally trained to deal with joint trials where one of the co-accused has pleaded guilty. Moreover they take their oaths of office under the FC and cannot easily succumb to request to recuse on spurious and tenuous reasons;

(c) *Yap See Teck v Public Prosecutor* and *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406 which dealt with the same point both determined that a judge in a joint trial was neither impartial nor biased when a co-accused pleaded guilty and determined the proper procedure to be followed when a co-accused in a joint trial pleaded guilty; and

(d) the joint trial in the instant case was not predicated on a joint liability in that they were not charged with an offence requiring common intention under s 34 of the Penal Code.

[8] Accordingly he held that there was no basis for the contention that there was a 'real danger of bias' against the respondent, which is the correct test to apply.

THE DECISION OF THE COURT OF APPEAL

[9] The Court of Appeal reversed the decision of the High Court on the following grounds:

(a) *Yap See Teck v Public Prosecutor* was decided without the benefit of the 'real danger of bias' test as approved by the Federal Court. Neither was *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors*;

(b) the Court of Appeal was in a better position to consider the merits of an application for recusal as stated by this court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293;

(c) there was a 'danger' that the trial judge might be prejudiced and that danger was real. This was because it was not possible for him or any presiding judge who had looked and considered the facts of the case and the documentary exhibits in support of the guilty plea to be able to 'completely obliterate' this crucial fact from his mind;

(d) I can do no better than to quote from the judgment: '... *the test here is not whether there would be real bias on his part but a danger that there be so* and we must bear in mind the words of Lord Goff that the test is promulgated on the basis of a very low threshold of a possibility and not a probability of bias. ... In other words, such a possibility of bias could

not be ruled out, even though the probability could'; and

(e) the ratio of the decision above was applicable to all tiers of the courts whereby a presiding judge should now refrain from presiding over a trial after he had accepted the plea of guilt from a co-accused.

OUR ANALYSIS AND DECISION

[10] We have heard and considered both the oral and written submissions of learned counsel. We have given careful consideration to the judgments of the High Court and the Court of Appeal.

The law

[11] It is important to reiterate at this juncture that both tiers of the courts below, with respect, correctly relied on the law in relation to bias. It is in the application of the test to the facts and circumstances of the case that both parties arrived at diametrically opposing conclusions.

[12] The governing law in this country applies the test laid down in *Regina v Gough* [1993] AC 646 and is summarily stated to be a '*real danger of bias*'. The test was first adopted in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 by Edgar Joseph J in a judicial review case, reiterated in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, the only criminal case dealing with bias in the context of a habeas corpus application and *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, another civil matter relating to striking out under O 18 r 19 RHC.

[13] In all these cases the question before the court, as it is in this case is whether, having regard to the facts and circumstances, there was a real danger of bias on the part of the learned trial judge when he heard the case involving the respondent?

'Real danger of bias'

[14] What does 'real danger of bias' mean? In explaining this Lord Goff stated, inter alia:

> ... In my opinion, if, in the circumstances of the case (as ascertained by the court) it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand.
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> ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in

A any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which not necessarily be available to an observer in court at the relevant time *Finally for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias*. Accordingly, having ascertained the B relevant circumstances, *the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …*

C

[15] In *Sungai Gelugor* Edgar Joseph Jr FCJ explained that with this test, the opinion of the court substituted that of the reasonable man. Secondly, the real danger test he said, was a reasonable compromise between the 'reasonable suspicion' and 'real likelihood' of bias test meaning that the court was D contemplating a lower standard than that a likelihood or probability of bias. *It required a 'real possibility of bias'. It is important to comprehend that this court did not state that it was imposing a 'very low' threshold.*

E **[16]** Equally importantly the judge went on to state that this was the preferred test as it would avoid the setting aside of judgments upon 'quite insubstantial grounds and the flimsiest pretexts of bias'.

[17] And in *Tan Heng Chew* the Federal Court speaking through Hamid F Mohamed FCJ (later CJ) held that even though *R v Gough* had been refined in the UK in *Porter and another v Magill* [2002] 1 All ER 465, this was to ensure the law was in line with European jurisprudence, which was not applicable in Malaysia. More significantly, the court held that it was incumbent upon the court to be vigilant not to allow parties to engage in 'judge-shopping' under the G guise of recusal applications.

Application of the law to the facts of the instant case

[18] Before us the primary question is whether the Court of Appeal applied H the correct law to the facts correctly so as to arrive at a properly reasoned and correct decision. That requires an examination and analysis of the reasoning of the judgment of the Court of Appeal.

First ground put forward by the Court of Appeal

I

[19] At the outset the first reason put forward by the Court of Appeal for deciding that recusal was warranted is that the High Court judge had relied on *Yap See Teck v Public Prosecutor* and *Public Prosecutor v Mohd Amin bin Mohd Razali* where the 'real danger of bias' test was not applied.

[20] The court was effectively stating that without the *R v Gough* test, which was only introduced to this jurisdiction in 1993 in *Sungai Gelugor*, the courts of Malaysia had for decades prior to the case, *not* dealt with the issue of bias or impartiality correctly or at all.

[21] Can it be said that criminal and civil hearings and trials where recusal was sought prior to *Sungai Gelugor*, the courts had dealt with those cases improperly or without ensuring partiality?

[22] The further implication of such reasoning is that *Yap See Teck* is incorrectly determined, and *Mohd Amin Mohd Razali* was decided per incuriam, as it is a 2002 case and *Sungai Gelugor* was not referred to. This to my mind, with respect, is an erroneous proposition of law for the following reasons:

(a) *Yap See Teck* which dealt a joint trial where the accused persons were charged with jointly committed gang robbery, dealt directly with the issue of how a trial judge is to proceed when one co-accused pleads guilty and the other/s do not. It is on all fours with the present case. In *Yap See Teck* Azmi J (later FCJ) one of our foremost judges, relied on *Toh Ah Loh and Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72 and *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293b; [1950] 1 LNS 81 following the practice in the Criminal Courts in England and citing Abott J. Most pertinently, it was held that the fact that the President had recorded the facts of the prosecution case when convicting one accused, would not be prejudicial to the other accused on trial, as the fact of such a guilty plea having been taken and the record of conviction would be equally available to any other judge as much as that presiding judge. In other words, any other judge would be similarly circumstanced, as the fact of the co-accused having pleaded guilty and the record of his consent to the facts relied upon by the prosecution, would be available to that judge too.

In *Mohd Amin bin Mohd Razali* the same reasoning was adopted by the learned Zulkifli J (later CJM). The Court of Appeal, with respect, did not consider this salient point in determining that these two cases were inapplicable;

(b) the effect of the decision in *Yap See Teck* and *Mohd Amin bin Mohd Razali* is that when there is a joint trial and one co-accused pleads guilty and is then convicted and sentenced, the other accused would still receive a fair trial because all the facts pertaining to the charge would have to be adduced and proven afresh against the remaining accused person/s.

The accused person/s who did not plead guilty would be accorded a full opportunity to defend themselves via the subsisting criminal justice

system, which places primary importance on the continuing impar tiality of a trial judge. If a real possibility of bias remained for the other accused, such a procedure would not have been approved and set down in respect of joint trials, a practice which is followed in the criminal courts to this day;

(c) the Court of Appeal also failed to consider that *the guilty plea of the co-accused was not evidence against the respondent. A judge is required to consider separately and independently, the evidence against the respondent.* One such example is confessions, which are admitted at trial. A confession might have details of the involvement of co-accused, which are not admissible against the co-accused, but can be utilised against one accused. The judge will hear the details but does not recuse himself purely on the basis that he heard the confession which implicated the co-accused;

(d) the Court of Appeal failed to appreciate that there is no trial when the accused pleads guilty. There cannot be a trial, because there is no issue that requires adjudication. As such, the trial judge when recording, makes no finding on the facts that might pre-dispose him against the remaining accused, in this case the respondent; and

(e) the Court of Appeal also failed to consider that in the course of his proceedings in recording a guilty plea and being convicted and sentenced, Tan was not a witness. As such, the trial judge did not at that stage, have to consider, nor accept him, as a credible witness. Tan's credibility was not in issue before the trial judge, establishing that he made no finding against, or in favour of Tan. Therefore, there could be no question of any such predisposition for or against the respondent.

[23] To that extent we are of the view that this ground is without merit and does not warrant the trial judge being recused.

Second ground put forward by the Court of Appeal

[24] Citing *Dato' Tan Heng Chew*'s case, the Court of Appeal relied, inter alia, on the sentiment expressed by the judge in that case, namely that in order to maintain the highest standard of public confidence in the judiciary the judge would err on the side of recusal. It is evident from a perusal of the case that the judge was speaking with reference to the particular facts of that case.

[25] Further, with the greatest respect, the Court of Appeal does not appear to have given weight to the sentence following that, namely the cautionary note that each case was to be decided on its own facts and the court should be vigilant not to allow parties to do 'judge-shopping' by recusal of judges.

Third ground put forward by the Court of Appeal

[26] The other salient factors that were overlooked by the Court of Appeal in applying this passage *in vacuo*, as it were, are that:

(a) *Tan Heng Chew*'s case involved a situation where in the course of a striking out application under O 18 r 19 where only affidavit evidence is permissible, *the judge at first instance made findings of fact of credibility against one of the deponents, in reasonably strong terms*. It was because of this that both the Court of Appeal and Federal Court determined that it was best that the judge be recused. This is completely different from the present case where there has been no adjudication whatsoever as explained above; and

(b) the Court of Appeal in applying the 'real danger of bias' test explained it thus: '... *the test here is not whether there would be a real bias on his part but a danger that there be so* and we must bear in mind the words of Lord Goff that the test is promulgated on the *basis of a very low threshold* of a possibility and not a probability of bias ... In other words, such a possibility of bias could not be ruled out, even though the probability could'.

[27] This statement discloses that the Court of Appeal applied a test of whether there was *a danger of real bias* on the part of the trial judge. However the test prescribed in *R v Gough* as adopted in this jurisdiction is 'a real danger of bias'.

[28] There is a difference between *a danger of real bias* and *a real danger of bias*. So the Court of Appeal conflated the tests somewhat, by requiring any possibility of real bias, while the correct test requires a real possibility of bias. In so conflating the test, the Court of Appeal applied a very low threshold, thereby committing an error of law.

[29] The real danger of bias does not prescribe a very low threshold of bias. What it does is to apply a lower threshold than that of an apprehension of bias or likelihood of bias, as stated by Edgar Joseph Jr J in *Sungai Gelugor*. But such a threshold does not automatically translate to an extremely low threshold.

Fourth ground put forward by the Court of Appeal: The requirement to completely obliterate the facts in the presiding judge's mind

[30] The Court of Appeal erred in concluding that any presiding judge who hears the facts of a case in the course of recording a plea of guilt on the part of a co-accused in relation to the offering of a bribe, effectively results in a non-erasable bias on the part of the presiding judge, such that he is

automatically predisposed against the remaining accused. Such a conclusion is not warranted in view of the following matters, some of which have been referred to above:

(a) a judge is a professional who undertakes the job of determining the guilt or otherwise of an accused such as the respondent, on the basis of evidence which has been the subject of the due process of law. That means he relies on evidence that has been subject to the laws of evidence and cross-examination. A judge, unlike jurors, is trained in the law so as to remain impartial despite reading facts relating to a case. This is particularly apparent in today's world where social media ensures that not only the facts of a case, but a myriad of opinions and comments, are virtually inescapable. It is therefore incorrect to assume that a mere recording or sighting of a factual matrix will create a bias against the respondent;

(b) a judge takes the judicial oath of office, which requires adherence to the Federal Constitution. Article 5 of the FC which enshrines the right to life, encompasses the right to a fair trial (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 and *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647). The essence of a fair trial is an impartial judge as famously stated in *B Surinder Singh Kanda v Government of Malaya* [1962] AC 322 where Lord Denning described one of the twin pillars of the laws of natural justice as comprising, inter alia, an impartial tribunal or judge. The laws of natural justice comprising a part of the common law are an intrinsic part of the FC. This fundamental aspect of a judge's function and independence cannot be undermined by spurious and insubstantial attempts to allege bias.

(c) the practice of a presiding judge continuing to hear a joint trial after one co-accused has pleaded guilty is settled law in this jurisdiction, based on a long line of authorities that implicitly recognised and affirmed that impartiality was maintained in such a joint trial. The reasoning in that line of case law, in both *Yap See Teck* and *Mohd Amin bin Mohd Razali* ought not to be lightly disturbed, again on relatively flimsy grounds. That is why a prescribed procedure has been advocated and followed for several decades.

That procedure prescribed by case-law takes into consideration the possibility of bias and has dismissed it on cogent grounds. In short, it is implicit that the conduct of a trial in such a manner meets, and does not transgress, the fundamental requirement of impartiality in a judge. The fact that the test for bias in this country was only adopted after *Sungai Gelugor* cannot erode the jurisprudence that accommodated and ensured impartiality in the older criminal case-law. In view of such impartiality it

cannot be said that those cases did not address the test of a real possibility of bias; and

(d) finally the Court of Appeal failed to consider the important fact that even if the case is referred to another judge, the record of the plea of guilt and the facts of the case as adduced by the prosecution and agreed to by the co-accused would be equally available to the new judge. Therefore any allegation of a real danger of bias is palpably unfounded in relation to the original court and original presiding judge.

[31] For these reasons I am of the considered view that the Court of Appeal committed errors of law and applied the law incorrectly to the facts of this case. This warrants intervention and reversal. The decision of the Court of Appeal is reversed.

[32] The case is fixed for mention in the original High Court for continued hearing.

Appeal allowed and COA's decision set aside.

Reported by Ashok Kumar